Toolukannaammah @ Mariayee & Ors (as administrator for estate of Arumugam a/l Nagappan) v Perumal a/l Nagappan

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-129–03 OF 2014
HAYATUL AKMAL JC
23 APRIL 2018

Land Law — Trusts — Trust of land alleged — Land dispute — Whether plaintiffs had locus standi to bring action without letter of administration — Whether position of trust over land existed — Whether defendant held land in trust for benefit of himself and plaintiffs

Trusts and Trustees — Land — Creation of trust — Land dispute — Whether plaintiffs had locus standi to bring action without letter of administration — Whether position of trust over land existed — Whether defendant held land in trust for benefit of himself and plaintiffs

The first to fifth plaintiffs including Arumugam a/l Nagappan (who was represented in the present suit by his son and administrators of his estate name Magesvaran a/l Arumugam, the sixth plaintiff) and the defendant were siblings and the lawful children of Mrs Parashammah d/o Movalan ('the said mother') and Mr Nagappan ('the said father'). In 1965, the said mother applied for a piece of land ('the said land') under a scheme by the state government of Selangor for the poor known as Rancangan Tanah Di Sg Kayu Ara. Her application was approved, but vacant possession of the said lot where the parties were residing in was given in 1968 where the said mother and father and the late Arumugam built a house on it ('the family house'). According to the plaintiff, after the mother's death the defendant informed the fifth plaintiff and Arumugam that there were payments still due to be paid for the said land and to prevent the government from repossessing the said land, the defendant would make an application in his name as next of kin of the mother and he would hold the land on trust for all the siblings. The premium for the said land was paid equally by the defendant, the fifth plaintiff and the said Arumugam and no contribution was collected from the sisters on the instructions of the defendant. In 1984, the State Government of Selangor approved the said land for alienation to the defendant and after the payment of the premium and final survey done it was delineated as Lot 945. The issued document of title was issued on 12 March 1988 where the said land was subsequently registered in the defendant's name and given a new title known as PM3777 Lot 13620 Pekan Kayu Ara Tempat Kg Sg Kayu Ara Daerah Petaling (Lot 945). The fifth plaintiff and the late Arumugam claimed that they paid the quit rent and

assessment of the said land and the plaintiffs had filed the present suit because the defendant had refused to transfer the said land into their respective names. The defendant in his defence denied the claim by the plaintiffs and claimed that he was not holding the said land on trust for his siblings and that the land that was registered under his name was different from the said land approved to the late mother. The issues arose were: (a) whether the plaintiffs had the locus to bring the present action without any letter of administration; and (b) whether there existed a position of trust over the said land whereby the defendant was held out to hold the said land for the benefit of himself and the respective plaintiffs.

Held, allowing the plaintiffs' claim with cost of RM25,000 awarded against the defendant subject to allocator fee:

(1) The law was trite that unless and until the premium was paid for as requested by the state authority and the issue of document of tittle was issued, legal ownership did not follow and the approved land for alienation remained for all interest and purposes, state land. In light of the fact that the said land was never registered in the late mother's name, the said land would not be caught under the estate of the late mother. This was more so since the approval granted by state authority had lapsed. Therefore, the issue of the need for the letter of administration to commence the present suit by the plaintiffs would not be necessary (see para 28).

(2) It was found that that there was compelling evidence to hold that an existence of trust had been created over the said land. There was no ambiguity as to the certainty to create this trust, similarly there was no uncertainty as to the identity of the trust property and the list of lawful beneficiaries could be easily ascertained to satisfy the requirements for certainty of object of the said trust (see paras 30–31).

[Bahasa Malaysia summary

Plaintif pertama hingga plaintif kelima termasuk Arumugam a/l Nagappan (diwakili oleh anak lelaki dalam tindakan semasa dan pentadbir harta bernama Magesvaran a/l Arumugam, plaintif keenam) dan defendan merupakan adik-beradik dan anak yang sah di sisi undang-undang kepada Puan Parashammah ('ibu tersebut') dan En Nagappan ('ayah tersebut'). Pada 1965, ibu tersebut memohon untuk memilik tanah ('tanah tersebut') di bawah satu skim oleh Kerajaan Negeri Selangor untuk golongan miskin yang dikenali sebagai Rancangan Tanah di Sg Kayu Ara. Permohonannya diterima, tetapi pemilikan kosong telah diberikan pada 1968 di mana pihak-pihak yang menetap di situ iaitu ibu tersebut, ayah tersebut dan mendiang Arumugam telah membina rumah di tanah tersebut ('rumah keluarga tersebut'). Berdasarkan keterangan x, selepas kematian ibu tersebut defendan memaklumkan kepada plaintif kelima dan Arumugam bahawa terdapat

tunggakan bayaran untuk tanah tersebut. Untuk menghalang kerajaan mengambil alih tanah tersebut, defendan telah membuat satu permohonan di mana defendan dinamakan sabagai waris kepada ibu tersebut dan dijadikan sebagai pemegang amanah untuk kesemua adik-beradik bagi tanah tersebut. Premium tanah tersebut dibayar secara saksama oleh defendant, plaintif kelima dan Arumugam dan tiada sumbangan diberikan oleh adik-beradik perempuan atas arahan defendan. Pada 1984, kerajan negeri Selangor meluluskan pengambilan tanah tersebut oleh defendan dan selepas bayaran premium dan kajian terakhir dibuat, tanah tersebut dikenali sebagai Lot 945. IDT telah dikeluarkan pada 12 Mac 1988 di mana tanah tersebut telah didaftarkan di bawah nama defendan dan diberi pemilikan baru dikenali PM3777 Lot 13620 Pekan Kayu Ara Tempat Kg Sg Kayu Ara Daerah Petaling (Lot 945). Plaintif kelima dan Arumugam mengatakan mereka membayar cukai pintu dan cukai taksiran untuk tanah tersebut dan plaintif mengfailkan permohonan semasa ini kerana enggan menyerahkan pemilikan tanah tersebut kepada mereka. Defendan, dalam hujahan pembelaan, mengatakan plaintif bukanlah pemegang amanah untuk kesemua adik beradik bagi tanah tersebut dan tanah yang didaftarkan di bawah nama plaintif adalah berlainan dengan tanah yang diluluskan untuk pemilikan ibu tersebut. Isu-isu yang dibangkitkan ialah: (a) sama ada plaintif ada locus standi untuk mengambil tindakan semasa tanpa surat pentadbiran; dan (b) sama ada wujud amanah yang diberikan kepada plaintif untuk tanah tersebut demi kepentingan defendant dan plaintif-plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos RM25,000 dikenakan kepada defendan tertakluk pada fi alokator:

(1) Undang-undang adalah mantap bahawa melainkan dan sehingga premium dibayar sepertimana dipohon oleh pihak berkuasa negeri dan setelah IDT dikeluarkan, pemilikan undang-undang terhadap tanah tidak akan berpindah milik dan tanah yang diluluskan itu akan kekal untuk semua kepentingan dan tujuan, adalah milik kerajaan negeri. Dalam tindakan semasa, tanah tersebut tidak pernah didaftarkan di atas nama mendiang ibu tersebut, oleh itu tanah tersebut tidak dianggap sebagai harta mendiang ibu tersebut. Ini disokong memandangkan kelulusan yang diberikan pihak berkuasa negeri sudah terhapus. Oleh itu, tiada keperluan untuk menggunakan surat pentadbiran untuk memulakan tindakan semasa oleh plaintif-plaintif (lihat perenggan 28).

(2) Adalah didapati adanya keterangan yang menjurus kepada kewujudan amanah terhadap tanah tersebut. Tiada sebarang keraguan mengenai kepastian untuk mewujudkan amanah, sepertimana tiadanya ketidakpastian mengenai identiti harta amanah tersebut dan senarai benefisiari dengan mudah boleh dikenal pasti untuk memenuhi keperluan bagi kepastian objek dalam amanah yang dinyatakan tersebut (lihat perenggan 30–31).]

Notes

For a case on trust of land alleged, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 5968.

For cases on creation of trust, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3302–3307.

Cases referred to

AR PL Palaniappa Chettiar v Lakshamanan Chettiar [1983] 2 MLJ 177, PC (refd)

Foreman v Hazard [1984] 1 NZLR 586, CA (refd)

Grant v Grant 55 ER 776 (refd)

Gulbenkian's Settlement Trusts, Re; Whishaw v Stephens [1970] AC 508, HL (refd)

Hameeda Bee v Mrs P Seenivasagam [1950] 1 MLJ 267, CA (refd)

Koh Ying Huat v Koh Kah Hing Sdn Bhd [1992] MLJU 2; [1994] 3 CLJ 777, HC (refd)

Last, Re [1958] 1 All ER 316, PD (refd)

Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene [1995] 1 MLJ 115; [1995] 1 CLJ 875, HC (refd)

Morice v The Bishop of Durham (1804) 9 Ves Jun 399; (1805) ER 656 (refd)

Palmer v Simmonds (1854) 2 Drew 221; 61 ER 704 (refd)

Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97; [2005] 4 CLJ 750, CA (refd)

Quah Eng Hock v Ang Hooi Kiam [1999] MLJU 481; [2000] 2 AMR 2300; [2000] 5 CLJ 126, HC (refd)

Wan Naimah v Wan Mohamad Nawawai [1974] 1 MLJ 41, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 18

Limitation Act 1953 s 22, 22(1)(b)

National Land Code s 340

Devahi Rosalind John (Atma Singh Veriah with her) (Atma Singh Veriah & Co) for the plaintiffs.

Joseph Iruthayam (Joseph Iruthayam & Co) for the defendant.

Hayatul Akmal JC:

INTRODUCTION

[1] The subject matter of the civil suit before this court today revolves on the issue pertaining to the trust and beneficial ownership of land and the manner in which parties had elected to deal with it and the resultant civil claim that has arisen from it. This proceeding has been a long-drawn process for the parties which arises as early as year 1965.

[2] This trial was partly heard by the previous learned judicial commissioner ('the learned JC') before it was adjourned at the stage of cross-examination of the defendant's sixth witness ('DW6') where the said learned JC subsequently retired. When I took over and presided on the continuing trial of this case on 16 August 2017, the respective learned counsels have no objection for me to proceed with the trial. I refer to s 18 of the Courts of Judicature Act 1964 (Act 91) ('the CJA') which provides as follows:

> 18 Proceedings in High Court to be disposed of by single judge:
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> (1) Every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be heard and disposed of before a single judge.
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> (2) Whenever any judge, after having heard and recorded the whole or any part of the evidence in a proceeding, is unable through death, illness or other cause to conclude the proceeding, another judge may:
>
> (a) continue with the proceeding from the stage at which the previous judge left it and:
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> (i) act on the evidence already recorded by the previous judge; or
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> (ii) act on the evidence partly recorded by the previous judge and partly by himself; or
>
> (b) resummons the witnesses and recommence the proceeding.
>
> (3) Where the judge acts under subparagraph 2(a)(i) he may, either on his volition or at the request of any party to the proceeding, recall any of the witnesses as in respect of any part of the evidence already recorded, or he may take their evidence afresh:

The whole proceeding was recorded on the dedicated court recording transcript ('CRT') system and it is to be noted that the right to recall any witness as provided for under s 18 of the CJA, was not invoked by any of the respective counsels and neither did I find it necessary to recall any witnesses. It was my judicious observation and decision that none of the parties would be prejudiced and therefore I proceeded to preside over this part heard.

[3] Briefly, the plaintiffs filed a writ of summons and statement of claim (amended) against the defendant as follows:

(a) a declaration that the land held under PM 3777 Lot 13620 Pekan Kayu Ara Tempat Kg Sg Kayu Ara Daerah Petaling Jaya and registered in the name of the defendant is held in trust by the defendant for all the children of Parashammah d/o Movalan (NRIC No 3683330) namely the plaintiffs, the defendant and the lawful children of Arumugam a/l Nagappan ('the deceased'); and

(b) an order that the defendant within 21 days from the date of this order transfer a one seventh share in land held under PM 3777 Lot 13620 Pekan Kayu Ara Tempat Kg Sg Kayu Ara Daerah Petaling Jaya into the respective names of the plaintiffs, the defendant and the administrators of the estate of Arumugam a/l Nagappan ('the deceased'), failing which the Senior Assistant Registrar, High Court Shah Alam do execute the memorandum of transfer transferring an undivided one seventh share in the said land into the respective names of the plaintiffs, the defendant and the administrators of the estate of Arumugam a/l Nagappan ('the deceased') and also the cost of this proceeding.

[4] The full trial commenced on 25 August 2016 at the stage of cross-examination of the defendant's sixth witness ('DW6') and I proceeded with the continued full hearing of the matter which was held on the 16 August 2017, 23 August 2017, 18 September 2017, 30 October 2017, 8 December 2017, 14 December 2017 respectively, with the list of witnesses as follows:

(a) The plaintiffs had called five witnesses:

PW1 — Encik Syafril Idzwan Abd Khalid, Penolong Pegawai Daerah;

PW2 — Ms Malinee a/p Arumugam, daughter of late Arumugam;

PW3 — Ms Nagammah a/p Nagappan, the second plaintiff;

PW4 — Encik Mohd Khairul Ashraff bin Radzali, Setiausaha Majlis Mesyuarat Kerajaan Negeri Selangor; and

PW5 — Mr Nedinchelian a/l Nagappan, the fifth plaintiff.

(b) The defendant had called seven witnesses:

DW 1 — Mr Poovarasan a/l Perumal, the defendant's son;

DW 2 — Mr Palany a/l Ramasamy, Library Assistant;

DW 3 — Encik Muhammad Hasif bin Hussin, Pegawai Tadbir di Dewan Bandaraya Kuala Lumpur;

DW 4 — Mr Arumugam a/l Muthaiah, driver;

DW 5 — Mr Devarajoo a/l Marathey, taxi driver;

DW 6 — Mr Manimaran a/l Perumal, the defendant's son; and

DW 7 — Mr Perumal a/l Nagappan the defendant himself.

[5] The evidence from the parties have been duly recorded and upon perusing all the evidence, relevant cause papers and the respective written submissions/reply by the counsels, on 20 February 2018, I find the plaintiffs have succeeded in making its case on balance of probabilities and therefore I find in favour of the plaintiffs. Dissatisfied with the above decision, the defendant is now appealing against the said decision. My reasons are as follows:

BRIEF FACTS

[6] Parties have filed two sets of agreed facts (encls 20 and 93, respectively). Briefly, the first to fifth plaintiffs including Arumugam a/l Nagappan (who passed away on 7 April 2013, survived by four children, and is represented in this suit by his son and administrators of his estate name Magesvaran a/l Arumugam the sixth plaintiff) and the defendant ('the eldest son') are siblings and the lawful children of Mrs Parashammah d/o Movalan ('the said mother') and Mr Nagappan ('the said father'). The second, fourth, fifth and the children of the late Arumugam all reside on PM 3777 Lot 13620 Pekan Kayu Ara Tempat Kg Sg Kayu Ara Daerah Petaling Jaya held under title No 1-IS(M) 5309 PT No 945 Tempat Kg Sg Kayu Ara, Mukim Sungai Buloh, Negeri Selanqor ('the said land').

[7] The said mother, the defendant and the late Arumugam, all worked as rubber tappers in Effingham Estate at Batu 8 ('the Effingham Estate'). The said mother together with the said father and all of her children resided on the estate quarters ('the said quarters'). Upon their marriages, the defendant and the third and the fourth plaintiff moved out of the said quarters but Arumugam, the second and the fifth plaintiff continued to stay with the said mother in the said quarters. In 1965 the said mother applied for a piece of land ('the said land') under a scheme by the State Government Negeri Selangor for the poor known as Rancangan Tanah Di Sg Kayu Ara. Her application was approved for alienation of Lot 141 on 23 June 1977, but vacant possession of the said lot where the parties are now residing in was given in 1968 where the said mother and father and the late Arumugam built a house on it ('the family house'). Sometime in 1973 the Effingham Estate was sold, and all of the estate workers had to vacate their quarters. The said mother, the said father, the second, third and fifth plaintiff moved in the family house. While the fourth plaintiff and the defendant moved to a house built on government land which the late mother had purchased from one Kooillamah.

[8] Sadly the said father passed away in 1974 and the said mother passed away on 12 August 1978 before the approval letter could be delivered to her. The said mother was survived by eight children ie the first to fifth plaintiffs, a daughter Arayee a/p Nagappan (who passed away on 4 April 1982 without any issue), Arumugam and the defendant. At the time of the said mother's death,

A the parties herein continued to occupy the said land notwithstanding that the late mother had not paid the premium imposed by the state authority where the second, fourth, fifth plaintiffs, the defendant and the late Arumugam were all living on the said land in their own respective houses with their respective families. According to the plaintiff, after the mother's death the defendant
B informed the fifth plaintiff and Arumugam that there were payments still due to be paid for the said land and to prevent the government from repossessing the said land, the defendant would make an application in his name as next of kin ('waris') of the mother and he will hold the land on trust for all the siblings.
C The premium for the said land was paid equally by the defendant, the fifth plaintiff and the said Arumugam and no contribution was collected from the sisters on the instructions of the defendant.

[9] In 1984, the State Government of Selangor approved the said land for
D alienation to the defendant and after the payment of the premium and final survey done it was delineated as Lot 945. The issued document of title ('IDT') was issued on 12 March 1988 where the said land was subsequently registered in the defendant's name and given a new title known as PM3777 Lot 13620 Pekan Kayu Ara Tempat Kg Sg Kayu Ara Daerah Petaling (Lot 945). After the
E said registration, the second plaintiff built another house in 1994, the fourth plaintiff built a house in 1996, the fifth plaintiff built five more houses which he rented out and the defendant built three more houses and two shop houses, on the said land.

F **[10]** The fifth plaintiff and the late Arumugam claimed that they paid the quit rent and assessment of the said land (exhs P3 and P3(T) (translated copy), P7 and P8) and the plaintiffs' have filed this suit because the defendant had refused to transfer the said land into their respective names. The defendant in
G his defence denies the claim by the plaintiffs and claimed that he was not holding the said land on trust for his siblings and that the land that was registered under his name is different from the said land approved to the late mother.

H ISSUES TO BE TRIED

[11] Parties have elected to file their respective issues to be tried separately (encls 10, 14, 19 and 92, respectively) which I find, most issues are redundant and repetitious of each other which obscures the fundamental issue. Briefly the
I fundamental issue before this court is whether there exists a position of trust over the said land whereby the defendant is held out to hold the said land for the benefit of himself and the respective plaintiffs herein. For this purpose, the court had been adduced with conflicting evidence for and against. What is needed to be determined is whether there was:

(a) clear intention by words and conduct of the parties that the said land was to be held on trust for the benefit of the defendant and the plaintiffs;

(b) that the payment of the premium for the said land was contributed by the defendant and some of the plaintiffs; and

(c) that the three C's for the creation of a valid trust had been satisfied, ie certainty of the subject matter of the trust; certainty of the object of the trust and certainty of the words creating the trust.

THE PLAINTIFFS' CASE

[12] The plaintiffs pleaded that the defendant had applied for the said land as a 'waris' (heir) of the original applicant (the said mother) but the defendant denied this fact and argued otherwise and that he had applied for the said land in his personal capacity. It was submitted that the plaintiffs case is supported by the evidence of PW5 who stated that after the said mother's death in 1978, the defendant had in 1981, informed PW5 and the late Arumugam that there were payments still due to be paid for the said land to the government and in order to prevent the government from taking over the said land, the defendant will apply for the said land as 'waris' of the said mother and he will hold the said land in trust for all siblings. PW5's evidence is corroborated by a letter from Pejabat Daerah Dan Tanah Petaling dated 10 January 2014 (Bundle B, Part B, (pp 103–104)), issued by PW1.

[13] PW1 is the Penolong Pegawai Daerah Petaling, that according to the land office records he agreed that the first and original applicant/*penama asal* was Parashammah a/p Molavan ('the said mother'), however the said mother passed away before the letter of approval could be delivered to the said mother. On 9 July 1981, the office received an application (exh P1) from Perumal a/l Nagappan ('the defendant') as 'waris' to the said mother. PW1 also agreed that the defendant in the application above had also enclosed the required *pelan tapak dan kawasan* (exh P1(A)) and agreed that the defendant's application was for Lot 141 based on the record ('rekod keputusan') Majlis Mesyarat Kerajaan Negeri Selangor ('MMKNS'). The plaintiffs further submitted that the evidence of PW1 is corroborated by the evidence of PW4 who is the Secretary of MMKNS, and who relied on the 'Minit Mesyuarat Majlis Mesyuarat Kerajaan Negeri Selangor Yang Ke-26 (26/84) yang telah diadakan di bilik Majlis Mesyuarat Kerajaan Negeri Selangor pada hari Selesa 19 hb Jun 1984 jam 9.30' (refer Bundle B1 (Part B), pp 144–149). PW4 agreed that Lampiran A stated that the applicant ie Perumal a/l Nagappan (the defendant) is the son of the first and original applicant (*penama asal*). PW4 also agreed that according to his records, the first and original applicant (*penama asal*) has applied for the said land and was approved and that the defendant had applied as a 'waris' to the said original applicant and during the meeting MMKNS on

A 23 June 1977, it was approved to the applicant Perumal a/l Nagappan (the defendant).

[14] PW5 in his evidence stated that the defendant applied for the said land in 1981 and in 1984 the defendant told PW5 and Arumugam that there is B premium of RM5165.75 to be made for the said land and have asked them to contribute 1/3 each. They contributed cash, ie, 1/3 each since they were financially better off than the defendant who was working as a cleaner and was earning RM250 then. PW5 also confirmed that upon the instruction of the defendant, no contribution was collected from their sisters. It is also the C contention of the plaintiffs that a letter dated 25 May 1986 (exhs P3 and P3(T) translated copy), which was sent by the defendant (denied by the defendant) to PW5 and Arumugam after they had paid their 1/3 share each of the premium, confirmed that the said land to be apportioned into three parts with the front D portion abutting the main road occupied by PW5, the side by Arumugam where his house was located and the back portion by the defendant where his house and grocery shop were located. This fact was further confirmed by the evidence of PW2 (daughter of the late Arumugam) and through her, a letter dated 3 March 2000 allegedly written (in Tamil) by the defendant to her father E ('late Arumugam') was tendered (('exh P2') and ('exh P2(T)') translated copy), where the defendant admitted the trust over the said land.

[15] The defendant argued that the plaintiffs have no locus to bring this action without the letter of administration in respect of the late mother's estate. F The plaintiffs however contended this to be a non-issue because at no time did the plaintiffs pleaded that the property was registered in the said late mother's name and that the land formed part of the late mother's estate. The plaintiffs claim against the defendant is that he is holding the said land upon trust for them (the plaintiffs). As for the estate of Arumugam, the letter of G administration ('LA') was obtained for the estate of the deceased Arumugam by his heir Mageswaran ('the sixth plaintiff') to be added as a party to the action as Arumugam had one seventh share in the said land held by the defendant in trust for the siblings.

H **[16]** The plaintiffs argued that they have never demanded that they are claiming through their legal position as the beneficiaries of the said late mother under her estate, but instead they are claiming as lawful beneficiaries under the trust created by the defendant upon the land being registered in his name in 1988. The plaintiffs are claiming as beneficiaries under a purported trust I created between them and the defendant when the defendant applied for the said land as 'waris' of the late mother right up to when the said land land was registered in his name in 1988. It was argued by the plaintiffs, that plaintiffs and Arumugam had not acquiesced or were guilty of laches because the defendant had apportioned the land into three parts in 1984 which is

confirmed by the defendant's own letter dated 25 May 1986 and later after the land was registered in the defendant's name in1988. PW3, fourth plaintiff and PW5 and the said Arumugam asserted their rights as beneficiaries under the said trust created by building houses and shops on the said land in their own right and having the water and electricity bills in their respective names save and except for Arumugam although the land was registered in the defendant's name. This, argued the plaintiffs refuted the defendant's allegation in court that he allowed the plaintiffs to reside on the said land due to their financial difficulties.

[17] It is also argued by the plaintiffs that s 22(1)(b) of the Limitation Act 1953 provides that that no period of limitation prescribed by the Limitation Act shall apply to a beneficiary under trust being an action to recover from the trustee trust property or the proceeds thereof. I was alluded to the decision in *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115; [1995] 1 CLJ 875 where Justice Vincent Ng held:

> Since the defendant's counter claim was an action by a beneficiary to recover trust property from a trustee no period of limitation applies under s 22(1)(b) of the Limitation Act. Therefor the defendant's counter claim is not time barred.

I was also alluded to the decision in *AR PL Palaniappa Chettiar v Lakshamanan Chettiar* [1983] 2 MLJ 177, Lord Brightman of the Privy Council stated:

> Finally on the issue of limitation, it is sufficient to quote by way of explanation, this passage from the judgment of the trial judge:
>
> > On the issue of limitation I agree with Mr Atma Singh Gill that this being an action by a beneficiary to recover trust property from a trustee no period of limitation can apply to it by virtue of the provisions of s 22(1)(b) of the Limitation Ordinance 1953 which states that 'No period of/imitation prescribed by Ordinance shall apply to an action by a beneficiary under a trust, being an action ... to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his own used'.

The decision in *Koh Ying Huat v Koh Kah Hing Sdn Bhd* [1992] MLJU 2; [1994] 3 CLJ 777, was also referred to where it was pronounced that that s 22 of the Limitation Act 1953 excludes the provision regarding limitation if the petitioner can prove that he is the beneficiary and can prove a trust.

[18] The defendant being the eldest of the siblings, the plaintiffs had no reason to doubt that the defendant would reject the trust status of the said land. Unfortunately, it is only now that the defendant denies the trust over the said land and refuses to transfer the plaintiffs' undivided share into their respective names. This together with the fact that most of the siblings resides and continue to occupy and reside with their respective families on the said land in houses built by them after the said land was registered in the defendant's name

clearly shows and infers the existence of the trust status of the said land. The defendant now denies the said trust and renege on the promise that he is holding the said land in trust for all the siblings. In this respect I was alluded to the case of *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41 where Suffian CJ delivering the judgment of the Federal Court quoted Romilly MR in *Grant v Grant* 55 ER 776:

> Words declaring a trust 'need not be in writing ... they must be clear unequivocal and irrevocable but it is not necessary to use any technical words. It is not necessary to say, 'I hold the property in trust for you', nor is it necessary to say 'I hold the same for your separate use'. Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that is also sufficient for the purpose of showing that the trust has been created, if he afterwards states that he so created the trust, though there were no witness except the donee present at the time the trust was created.

[19] The plaintiffs submitted that for the creation of a trust, there is no necessity for there to be an endorsement on the title. It is the evidence of PW1 and confirmed in the letter dated 10 January 2014 that the said land had been approved for the said mother and a premium had to be paid. What the plaintiffs are claiming and admitted by the defendant is that the defendant had applied as a 'waris' for the same Lot 141 approved for the said mother and based on the defendant's own declaration the defendant was holding the land in trust for the siblings when the land was registered in his name.

THE DEFENDANT'S CASE

[20] The defendant submitted that the evidence overwhelmingly confirmed that the plaintiffs' claim are based on the said mother's purported ownership of Lot 141. The plaintiff who initially claimed as beneficiaries of the late mother, when the defendant in his written submission to his application to strike out the plaintiff's action challenged that such a claim is untenable in law, they amended their statement of claim to delete the word 'beneficiary' to 'next of kin'. Be it beneficiary or next of kin, a claim based on right arising on a land purportedly vested on the late mother by virtue of approval given, it becomes necessary that letters of administration must be obtained before commencing this suit. The sixth plaintiff had obtained letter of administration for the estate of the late Arumugam and it equally applies to the other plaintiffs.

[21] It was argued by the defendant that trust property may include any type of movable and immovable property, and any interest in any property, movable or immovable, any debt, and anything in action, and any other right or interest, whether in possession or not. The defendant contends that there is no evidence to show that the said property is a trust property. The alleged trust purportedly created in 1978–1981 explains by itself that the trust property was vested in

MMKNS. In such circumstance the defendant could not have the right to create such an alleged trust when the land belongs to a third party. It was the argument of the defendant that alleged trust is a concoction to deprive the defendant of his land. It was further argued that from the records in court there is no evidence of any trust instrument or a trust deed evidencing the purported trust. It was argued that PW5 gave evidence that no trust deed was created nor a trust was endorsed on the register document of title. The plaintiffs' claim is based purportedly based on an oral trust. The defendant pointed out that as per the plaintiffs' statement of claim the purported first trust was created by the defendant sometime in 1978-1981. I was alluded to Court of Appeal case in *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97; [2005] 4 CLJ 750 where Gopal Sri Ram JCA observed:

> that there is not a jot of evidence that the first defendant ever declared itself a trustee of the plaintiffs in respect of the family shares ... there is nothing in that document or the surrounding circumstances that goes to affirmatively show a clear intention to create a binding declaration of a trust on the part of the defendant which is the true owner of the family shares ... the standard of proving that an express trust exists in a given circumstances is a high one. For, it the policy of the law that no person's property should be burdened with the interest of anther in the absence of the clearest proof. What the law requires is an intention to create a trust expressed in clear language.

[22] It is the pleaded case of the defendant that he never made the declaration of trust nor had he the capacity to do so at the material time when the purported trust was created. I was alluded to the case of *Hameeda Bee v Mrs P Seenivasagam* [1950] 1 MLJ 267 where the plaintiff sought a declaration that the defendant held 14/64 interest in the estate of M Shaik Adam ('the deceased') in trust for the plaintiff. Since the plaintiff had not discharged the burden of establishing a trust the claim failed. It was held clear and unequivocal language must be used to establish a trust. The defendant in the present case submitted that the purported second trust was conceived by the plaintiffs after the first trust failed. This trust was conceived after the submission on the striking out application by the defendant.

[23] The defendant argued that the plaintiffs' allegation that the defendant had diverted and kept the letter of approval from the said mother to prevent her from paying the premium is untrue otherwise the plaintiffs ought to have applied to set aside the registration in favour of the defendant under s 340 of the National Land Code. The plaintiffs had not made any allegation of fraud in their statement of claim. In the absence thereof, such allegation is malicious and dishonest. The land that was alienated to the defendant is the state land of Selangor and it had conformed to all the procedural steps before registration of title was made in his favour.

A THE LAW

[24] The principle pertaining to the formation of a valid trust may be discerned from the dicta of Richardson J in *Foreman v Hazard* [1984] 1 NZLR 586:

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> Property may be impressed with an express trust in one of two ways: either by a declaration of trust which involves a change in equitable ownership but not in legal title, or by a transfer of property to be held in trust by the transferee which involves a change in legal title and usually too in equitable ownership. No particular forms of word is required but in whatever way the intention is expressed the three certainties must be satisfied: certainty of intention to create a trust — that a trust is definitely intended; certainty of the subject-matter of the trust — that specified property is to be bound by the trust; and certainty of object, that is of the persons intended to have the benefit of the trust. In addition, the object of the trust must be lawful and any formalities required by the law for constituting the trust must have been complied with.

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For a valid declaration of trust in peninsula Malaysia is concerned, it is never dependent on any statutory formalities, save where there is a requirement under certain specific legislation otherwise an oral declaration of sufficient and good in law. No trust can be created unless the 3C legal requirement are met, ie; certainty of intention; certainty of subject matter; and certainty of objects.

E

[25] The words used to convey the intention must be sufficiently clear to demonstrate an intention to impose a mandatory obligation on the recipient of the property as opposed to a purely moral obligation, an intention that the objects of the trust will benefit come what may (see *The Law of trust & Equitable Obligations* (5th Ed, 2010), p 185, by Pearce, R, Stevens J and Barr). It was held in the case of *Quah Eng Hock v Ang Hooi Kiam* [1999] MLJU 481; [2000] 2 AMR 2300; [2000] 5 CLJ 126, that the words used must be clear and unequivocal indicating the intention to divest the donor from the beneficial interest would satisfy the certainty of intention. In *Gulbenkian's Settlement Trusts, Re; Whishaw v Stephens* [1970] AC 508, Lord Upjohn said that in cases of ambiguity the court must use 'innate common sense and desire to make sense of the settlor's expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language' (see *Equity & Trust in Malaysia* (2nd Ed, 2013) Mohsin Hingun, Wan Azlan Ahmad (Sweet & Maxwell Asia)).

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[26] Trusts can be declared over all kinds of property, be tangible or intangible. However it is a legal requirement that the trust property must be identified precisely and that it was to be held upon trust. This is a question of fact. If the creator has described the property as the 'bulk' of something, *Palmer v Simmonds* (1854) 2 Drew 221; 61 ER 704, said this was not sufficient to constitute a certain subject matter. This is because 'bulk' cannot be defined.

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However, according to the decision in *Last, Re* [1958] 1 All ER 316 at p 137, 'anything that is left' of the testator's estate was held to be sufficiently clear. The trust property must be precisely identified otherwise the trust will be void for uncertainty.

[27] Finally, the law requires that the object of the trust must be certain. And it will depend on the type of express trust in question (fixed or discretionary). This refers to who will be the beneficiaries to receive the benefit of the trust property, ie, there must be identifiable human beneficiaries in whose favour the court can lawfully decree performance of the said trust, otherwise aggrieved parties could institute civil suits for recovery (see *Morice v The Bishop of Durham* (1804) 9 Ves Jun 399; (1805) ER 656, per Grant MR, on appeal: (1805) 32 ER 1009).

FINDINGS OF THIS COURT

Whether the plaintiffs have the locus to bring this action without any letter of administration

[28] From the facts adduced during the trial I find that the said land, though originally was approved for alienation to the said mother but since she predeceased the delivery of the approval letter to her, she would in the circumstances have no knowledge of the said approval given by the state authority in respect of her application for the said land. The law is trite that unless and until the premium is paid for as requested by the state authority and the issue document of title is issued, legal ownership do not follow and the approved land for alienation remained for all intent and purposes, state land. Now whether the said approval letter was hidden from her by the defendant as alleged by the plaintiffs in the circumstances of the case is plausible but however no clear evidence is found sufficient enough to support such a conclusion. Therefore in light of the fact that the said land was never registered in the late mother's name, the said land would not be caught under the estate of the late mother. This is more so since the approval granted by the state authority had lapsed. Therefore, the issue of the need for the letter of administration to commence this suit by the plaintiffs would not be necessary contrary to the arguments of the defendant. This is strictly as suit by the plaintiffs anchored on the basis of the purported trust attached to the said land though registered to the defendant. In the present case the cause of action is on the basis of the alleged trust created on the said land which is detached from an action brought through the estate of the deceased mother.

Whether the said land that was approved for the mother was Lot 141 or Lot 945; and

whether there exists a position of trust over the said land whereby the defendant is held out to hold the said land for the benefit of himself and the respective plaintiffs

[29] In a nutshell, the late mother was a participant in the Selangor State Government scheme for land alienation to the poor in kampong Sungai Ara in 1965/66. Her application was approved for alienation of Lot 141 on 23 June 1977, but vacant possession of the said lot where the parties are now residing was given way back in 1968. Before the approval letter could be served she passed away in 1978 leaving behind eight children including the defendant and some of the plaintiffs. Notwithstanding her passing, the parties herein continued occupying the said land notwithstanding that the late mother had not paid the premium imposed by the state authority. However, it was shown to the court during the trial that notwithstanding that the approval by the state authority for the late mother had lapsed for non-payment of the required premium, the next of kin (her children) was allowed to apply to take her place for the said lot. It was a precarious position for all parties as the state authority can take back possession of the said land they are occupying by withdrawing the license/approval for them to continue staying on the said land. The evidence showed that the defendant (the eldest surviving son) had put in an application in 1981 as the next of kin for the said land. In 1984, the State Government of Selangor approved the said land for alienation to the defendant and after the payment of the premium and final survey done it was delineated as Lot 945 and the IDT issued in 1988. With this IDT, the occupation of the parties herein on the said land is secured.

[30] I find compelling evidence to hold that an existence of trust had been created over the said land. I hereby hold that the defendant is holding the said land on trust for the plaintiffs and will not be allowed to renege on his promise. The legal requirement of the 3C for a valid trust in the present case has been satisfied. There is no ambiguity as to the certainty to create this trust, similarly there is no uncertainty as to the identity of the trust property and the list of lawful beneficiaries could be easily ascertained to satisfy the requirements for certainty of object of the said trust. I hold in all the circumstances of the case that the requirements has been satisfied as set out in *Foreman v Hazard* case, that no particular forms of word is required but in whatever way the intention is expressed the three certainties must be satisfied:

(a) certainty of intention to create a trust — that a trust is definitely intended;

(b) certainty of the subject-matter of the trust — that specified property is to be bound by the trust; and

(c) certainty of object — that is of the persons intended to have the benefit of the trust.

[31] The evidence adduced shows plausible proof of the creation of the intention to create the trust. The intention existed when the defendant sought to apply for the approved lot given to the late mother with the consent of the

siblings and the trust was fully constituted when the said land was duly registered into the name of the defendant and at that moment the plaintiffs had a valid beneficial hold on the said property as agreed by the parties. The registration and issuance of the IDT would not have happened had the premium demanded by the state authority not been paid. As the evidence showed, the plaintiffs had contributed to the payment of the premium with the tacit and express understanding that the defendant had agreed to hold the said land upon trusts for himself and the plaintiffs. This would lend testimony to the living arrangement that the parties herein had on the said land during the lifetime of the late mother, during the application for ownership, during the approval granted by the state authority leading to the payment of the premium on the land by the combined efforts of the defendant and the plaintiffs. As what Lord Upjohn had expressed in *Gulbenkian*'s case, that the court must use 'innate common sense and desire to make sense of the settlor's expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language'. There is no uncertainty as to the trust property as evidence had been led in court that the said land registered in the name of the defendant is identical to and/or refers to the same land as approved to the late mother save for the change in the designated lot number and size after the final survey before the issuance of the IDT. This is a common practice and not to be taken as an exception or something out of the ordinary. The evidence by the officer from the state authorities (PW1 and PW4 confirms that). I have no doubt as to the identity of the trust property from the evidence adduced. By the same token all the plaintiffs are the lawful parties to benefit under the said trust property. The law of equity had determined that equity will look to the intent rather than to the form, and equity looks on that as done which ought to be done.

A B C D E F G H I

LIMITATION

[32] I agree with the submission of the plaintiffs that the issue of limitation does not apply to bar the prosecution of this action by the plaintiffs as the facts satisfy the exception pursuant to the Limitation Act of 1953 (Act 254). From the conduct of the defendant and the plaintiffs as disclosed from the testimony of witnesses and all evidence adduced, in all the circumstances of the case and on balance of probability, I find compelling evidence to hold that an existence of trust had been created over the said land. Reference is made to the decision in *Koh Ying Huat v Koh Kah Hing Sdn Bhd* that s 22 of the Limitation Act excludes the provision regarding limitation if the petitioner can prove that he is the beneficiary and can prove a trust which in this case as I have set out in the foregoing, the defendant is holding the said land on trust for his siblings.

A CONCLUSION

[33] In light of the foregoing and after closely scrutinising and examining all evidence adduced before me, I find the balance of probability had tilted in favour of the plaintiffs and I allowed the plaintiffs' claim as follows:

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(a) a declaration that the land held under PM 3777 Lot 13620 Pekan Kayu Ara Tempat Kg Sg Kayu Ara Daerah Petaling Jaya and registered in the name of the defendant is held upon trust by the defendant for all the children of Parashammah d/o Movalan (NRIC No 3683330) namely the plaintiffs, the defendant and the lawful children of Arumugam a/l Nagappan ('the deceased'); and

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(b) an order that the defendant within twenty one days) from the date of this order transfer a one seventh share in land held under PM 3777 Lot 13620 Pekan Kayu Ara Tempat Kg Sg Kayu Ara Daerah Petaling Jaya into the respective names of the plaintiffs, the defendant and the administrators of the estate of Arumugam a/l Nagappan (deceased), failing which the Senior Assistant Registrar, High Court Shah Alam do execute the memorandum of transfer transferring an undivided one seventh) share in the said land into the respective names of the plaintiffs, the defendant and the administrator of the estate of Arumugam a/l Nagappan (deceased); and

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(c) cost of RM25,000 is awarded against the defendant and allocator fee to be paid.

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Plaintiff's claim allowed with cost of RM25,000 awarded against defendant subject to allocator fee.

Reported by Mohd Kamarul Anwar

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